In the High Court of Judicature for Rajasthan Jaipur Bench

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Cr. Misc. Petition No.931/2000
Bhajan Singh ***Versus*** State; Dhanna & 8 Ors.

Date of Order ::: 07/09/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. Praveen Jain, for petitioner (complainant)
Mr. Arun Sharma, Public Prosecutor
Mr. GP Kaushik, for respondents (accused)

Instant petition U/s 482 CrPC has been filed by complainant against order dt.03/10/2000 whereby Chief Judl. Magistrate, Tonk rejected application filed by prosecution U/s 311 CrPC to summon medical jurist & radiologist for recording their evidence in Cr.Case No.194/90.

Petitioner lodged a written report at PS Aligarh (Tonk) on 08/02/90 alleging inter-alia that accused respondents duly armed with sharp-edged weapons & sticks inflicted blows upon him and Hemraj whose injuries were medically examined by Dr.Mukesh Sharma (medical jurist) – on whose advise, x-ray of injuries on injured was conducted by Dr. BK Mathur (radiologist).

On said report, police registered criminal case for offences U/Ss 323, 324, 325, 326 read with Ss.147/148/149, IPC and after

investigation, police submitted charge sheet No. 11/90 dt.21/02/90 against respondents (accused). During trial, statements of prosecution witnesses were recorded and since summons could not have been served upon afore named doctors, prosecution evidence was closed and defence evidence was then recorded and matter was fixed for final hearing. At this stage, application was filed by prosecution U/s 311 CrPC to call upon Dr. Mukesh Sharma & Dr.B.K.Mathur (medical jurist & radiologist) on the premise that it is essential for prosecution to prove reports of injury & x-ray which were prepared by afore-named doctors upon examination of injuries sustained on injured Hemraj. But the application was rejected by trial Magistrate vide order dt.03/10/2000 on the premise that incident is of 08/02/90 and charges were framed on 17/09/94 and application earlier filed by prosecution U/s 311, CrPC to include name of injured Hemraj in list of witnesses, was allowed but despite ample opportunity, prosecution failed to produce its witnesses; and the application was filed after closing of defence on 26/08/2000 and when the hearing remained inconclusive; therefore, he did not consider it proper to grant leave to record

statements of afore-named two witnesses on behalf of prosecution. Hence this petition.

Counsel for petitioner submits that doctors have medically examined injured Hemraj who sustained grievous injuries by sharp-edged weapon – reports of injury & x-ray were prepared by both these doctors and it was essential for prosecution to produce them in witness box in order to support these injury & x-ray reports – in absence of their statements being recorded, it may cause injustice to the complainant and therefore, learned trial Magistrate committed serious error of law in rejecting application U/s 311 CrPC. In support of contention, Counsel placed reliance upon decision of Apex Court in **Zahira H.Sheikh Vs. State of Gujarat (AIR 2006 SC 1367) and Shailendra Kumar Vs. State of Bihar (2002 Raj.Cr.C. (SC) 73)** and of this Court in **Umed Singh Vs. Devi Singh (1984 CrLR (Raj.) 580)**.

Counsel for respondents supported the order impugned and submits that learned trial Magistrate has rightly appreciated the facts on record as referred to in order impugned while considering & rejecting application U/s 311 CrPC.

I have considered contentions of Counsel for the parties and with their assistance,

examined material on record. Indisputably since injured Hemraj is said to have sustained grievous injuries, criminal case for offence U/s 326, IPC was registered against respondents (accused) for the incident impugned and Dr. Mukesh Sharma as medical jurist examined injured Hemraj and found injuries on his person vide injury report prepared by him and on whose advise, x-ray of injuries of injured was conducted by Dr.BK Mathur (radiologist) vide x-ray report. It was certainly vital evidence duly required to be recorded but summons could not have been served. It was otherwise required to take proper steps to procure presence of these two witnesses for recording of their statements, who were directly connected with injuries sustained on injured Hemraj in the incident in question.

U/s 311 CrPC, the Court is empowered to summon material witness and to examine or recall and re-examine at any stage of the case, if their evidence appears to the Court to be essential for just decision. A bare reading of Section 311 CrPC clearly reveals that power of Court is of wide amplitude and if there is any negligence, latches or mistakes on the part of prosecution by not examining material witnesses,

function of Court to render just decision by examining material witness at any stage, is not in any way impaired. After all, function of criminal courts is administration of justice and not to count errors committed by parties or to find out & declare who among the parties performed better.

In **Zahira H.Sheikh Vs. State of Gujarat (**supra), Apex Court recently examined scope of S.311 CrPC and observed ad infra:-

> “Section 311 confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind. The Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have

> to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge. The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. **AIR 1968 SC 178 Foll. (paras 25, 26, 27)**. ”

Indisputably, both medical jurist and radiologist (supra) were already named in list of prosecution witnesses. Merely because summons could not have been served upon them, it cannot be considered to be a ground to close prosecution evidence. Since Dr. Mukesh Sharma (medical

jurist) examined injured Hemraj and found injuries on his person as mentioned in injury report prepared by him and on whose advise, x-ray was conducted by Dr. BK Mathur (radiologist) who prepared x-ray report in question, which could have been corroborated by their testimony – in this view whereof, their statements were certainly essential for just decision in the case and their evidence need not be shut down merely on the ground of delay or latches on the part of prosecution agency or otherwise. It may be pointed out that injury report of injured Hemraj has been placed on record in course of prosecution evidence led and that clearly shows that he sustained grievous injuries by sharp-edged weapon. The evidence sought to be produced in order to corroborate injured witness is of vital importance for just decision in the case. The Court below ought not to have refused such evidence and proper steps should have been taken for calling upon material witnesses named above.

Consequently, misc. petition is hereby allowed alongwith stay petition No.663/2000. Order dt.03/10/2000 passed by Chief Judicial Magistrate Tonk is set aside and application U/s 311 CrPC for summoning material witnesses Dr.

Mukesh Sharma & Dr.BK Mathur stands allowed. Public Prosecutor may be asked to give necessary particulars of above named witnesses and the accused may be afforded to cross examine them and to lead defence evidence in support whereof. It is expected from trial Court to conclude trial expeditiously in accordance with law. Parties are directed to appear before trial Court on 22/10/07. A copy of this order be sent to trial Court for compliance.

(**Ajay Rastogi), J.**

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